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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-477

NOEL LEE LIPPMAN,
Petitioner,

vs

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by and through his attorney, James D. O'Connell, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit.

1. OPINIONS BELOW

Petitioner was convicted in the United States District Court for the Eastern District of Michigan, Southern Division, by a jury, on January 23, 1973, of violating Title 18 — United States Code — § § 371, 1510, and 2. On or about May 11, 1973, timely notice of appeal was filed, said notice being set out as Appendix A. On February 28, 1974, the Court of Appeals for the Sixth Circuit affirmed Petitioner's conviction. The written opinion of the Court is set out at Appendix B. On March 9, 1974, Petitioner filed his Request for Rehearing, En Banc. On September 12, 1974, the Court of Appeals denied Petitioner's Application for Rehearing, said Order being set forth at Appendix C.

2. JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Sixth Circuit was entered on February 28, 1974. Rehearing was denied on September 12, 1974. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 — United States Code — § 1254(1).

3. QUESTIONS PRESENTED

I.

UNDER THE CURRENT POSTURE OF THE FIFTH AMENDMENT MAY A CRIMINAL CONVICTION BE PERMITTED TO STAND WHEN SAID CONVICTION WAS OBTAINED OUTSIDE THE SCOPE OF THE PROSCRIBED ACTIVITY DESCRIBED BY THE STATUTE UNDER WHICH THE PROSECUTION WAS BROUGHT?

II.

UNDER THE CURRENT POSTURE OF THE FOURTH AMENDMENT MAY A CONVICTION BE PERMITTED TO STAND WHERE EVIDENCE INTRODUCED AT TRIAL WAS OBTAINED PURSUANT TO A WARRANTLESS SEARCH, NOTWITHSTANDING CONSENT, WHERE THERE IS EVIDENCE WHICH SUGGESTS THAT SAID CONSENT WAS THE PRODUCT OF COERCION?

III.

UNDER THE CURRENT POSTURE OF THE FIFTH AMENDMENT MAY A CRIMINAL CONVICTION BE PERMITTED TO STAND WHERE THE RECORD REFLECTS THAT THE TRIAL COURT'S CHARGE TO THE JURY VIOLATED DUE PROCESS OF LAW?

4. CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or

Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—

Shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to con-

duct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

Added Pub. L. 90-123, § 1(a), Nov. 3, 1967, 81 Stat. 362.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

5. STATEMENT OF THE CASE

The record in the matter at bar reflects that the Government accused Petitioner, an attorney, of impeding the flow of information relative to a criminal offense from a potential witness/informer to a criminal investigator (Agent of the Bureau of Narcotics and Dangerous Drugs) in violation of 18 United States Code—1510. In connection with the substantive offense, Petitioner was accused of conspiring to violate § 1510 (pursuant to 18 United States Code—371); and aiding and abetting the violation (pursuant to 18 United States Code—2).

At trial to a jury, Petitioner was convicted on all counts. On direct appeal to the Court of Appeals for the Sixth Circuit, conviction was affirmed and subsequent Petition for Rehearing, En Banc, was denied.

The salient facts underlying the conviction below reflect that one Zuber and one Staffel, a dentist, were engaged in a large-scale marijuana smuggling enterprise. (TR. 415, 452) Staffel was the smuggler and Zuber operated as the distributor. (TR. 147) In June, 1970, Staffel arranged for a shipment of marijuana to be delivered to a farm located outside of Monroe, Michigan. (TR. 218, 415) Arrangements had also been made for Zuber to fly in from California to set up the distribution for the contraband (TR. 415). The shipment consisted of some 1,450 pounds of marijuana. The following day, Zuber and another man (subsequently identified as Ken Rhodes); began preparing the contraband for distribution. At this point, police, apparently acting on a tip, raided the site and arrested Zuber and Rhodes. The same evening Zuber was released on bail. (Tr. 461)

Upon release from local custody, Zuber contacted Staffel and demanded $25,000.00, the money to be used to quash the criminal matter then pending against him. Zuber's demand for money was accompanied by threats to implicate Staffel in the smuggling operation. (TR. 147, 226) Staffel, unable to raise the $25,000.00 went to his bank and withdrew $15,000.00; gave it to Zuber and agreed to help Zuber in the defense of the criminal charges. (TR. 148, 228)

On the day following the pay-off to Zuber, Federal agents contacted Staffel; informed him that he was suspected of importing marijuana into this country; and requested permission to inspect Staffel's automobile. (TR. 149)[1] As a result of the agents' visit, Staffel sought legal advice; and was thereupon introduced to Petitioner, by one Judith Henke, Staffel's dental technician, and a friend of Lippman's. (TR. 151)

Following several discussions, Lippman agreed to represent Staffel. Several weeks later, Zuber contacted Staffel and demanded more money and collateral aid. (TR. 418-419) Staffel referred Zuber to Lippman who, in turn, arranged for counsel to represent Zuber at the preliminary examination on the local charges. (TR. 332-335) Attorney fees for said representation were paid by Staffel. Following Zuber's preliminary examination, the examining court bound the defendant over for trial in the Circuit Court, at which point, Lippman agreed to represent Zuber, and the agreed upon fee was paid by Staffel. (TR. 164-165, 904)

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[1] During the raid conducted at the farm, police confiscated a specially built camper which purportedly was used to transport marijuana and which belonged to Staffel. (TR. 229, 242-243.)

Subsequently, Lippman (with the consent of Zuber) arranged a meeting with local police for the purpose of aiding their efforts in investigating certain activities of organized crime. Zuber, through the efforts of his attorney, had agreed to supply police with information relative to organized crime. (TR. 908) The meeting was scheduled for March 30, 1971.

At the meeting, Lippman was advised that Federal agents, who were present, were interested in obtaining from Zuber, evidence relative to Staffel's involvement in marijuana smuggling. (TR. 426, 916-918) At this point, Lippman advised the agents that he also represented Staffel, and that further inquiry into Staffel's alleged criminal activity in his (Lippman's) presence would create a serious conflict of interest; whereupon Lippman excused himself from the meeting. (TR. 918) A short time later, Zuber left the conference and related to his attorney that the agents wanted him (Zuber) to implicate Staffel in the smuggling enterprise. (TR. 427, 920); Zuber then informed Lippman that he would not implicate Staffel, but that the three of them (Zuber, Staffel, and Lippman) should meet that night to discuss the matter. (TR. 921) Lippman agreed to bring Staffel to Zuber's motel that same evening. (TR. 921) Zuber then returned to the meeting with the police and Federal agents and Lippman left the premises.

On the evening of March 30, 1971, Lippman and Staffel met with Zuber in his room at the motel. During the course of the ensuing conversation, Zuber explained that Federal agents had offered assistance in Zuber's pending criminal case in return for his evidence and testimony relative to Staffel's involvement in the importation of marijuana. Zuber also related that he had refused to cooperate with the agents. Zuber then demanded that Staffel agree to

make weekly payments to Zuber's wife in the event he (Zuber) went to jail on the local charges. Zuber also demanded payment of attorney fees and expenses. These demands were contingent on Zuber's silence in relation to Staffel's participation in the smuggling enterprise. During this meeting, Lippman, acting in the capacity of attorney and counsellor to both Zuber and Staffel, arbitrated the discussion and helped settle the matter between his two clients.

Subsequently, it was learned that during the afternoon of March 30, 1971, Zuber had fully implicated Staffel in the smuggling operation; that he had made a full confession as to his own, as well as to Staffel's involvement; and that Zuber had signed a written statement which set out the detailed facts relative to the importation and distribution of marijuana. (TR. 428) It was also learned that Zuber, in return for his confession, was promised that he would receive the Government's help in extricating him from the ramifications of the pending charges against him; and that he would be granted immunity from a Federal prosecution. The deal was completed prior to the meeting that evening at the motel. (TR. 429)

Later, Petitioner learned that during the course of the meeting held in Zuber's motel room on March 30, 1971, Zuber had been outfitted with a body transmitter; that the conversations between Zuber, Lippman, and Staffel had been recorded; and that during the entire course of the meeting, agents had been monitoring and recording the conversations from the room next door. (TR. 429)

On August 4, 1972, Petitioner was indicted by a Federal grand jury on the substantive violation of impeding the flow of information relative to criminal activity from a witness/informer to a criminal investigator; with conspir-

acy to do the aforementioned act; and with aiding and abetting another (Staffel) to do said act.

Staffel was named with Lippman as a co-defendant[2] and prior to Petitioner's trial entered a plea of guilty. Both Staffel and Zuber testified for the Government at Petitioner's trial. On January 23, 1973, Lippman was convicted as charged in the indictment and subsequently sentenced to the custody of the Attorney General for a period of two years.[3]

6. REASONS FOR GRANTING THE WRIT

Petitioner contends that his conviction under 18 United States Code—1510, violates the Due Process Clause of the Fifth Amendment on the basis that said conviction was obtained outside the scope of activity proscribed by the statute. Petitioner further contends that evidence was introduced at trial which was obtained in violation of the Fourth Amendment and that by so doing, the Government fatally tainted the prosecution. And finally, Petitioner contends that the trial court's charge to the jury violated the fundamental protections of the Fifth Amendment thus requiring reversal of said conviction.

Notwithstanding Petitioner's allegations of error, the Court of Appeals for the Sixth Circuit affirmed the conviction obtained in the court below.

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[2] Lippman had ceased to represent Staffel several months prior to the rendering of the Federal indictment.

[3] The specific terms of Lippman's sentence included:

Six months incarceration; 18 months probation; a $2,500.00 fine; and a provision of probation which prohibits Petitioner from practicing law during said probation.

I.

UNDER THE CURRENT POSTURE OF THE FIFTH AMENDMENT MAY A CRIMINAL CONVICTION BE PERMITTED TO STAND WHEN SAID CONVICTION WAS OBTAINED OUTSIDE THE SCOPE OF THE PROSCRIBED ACTIVITY DESCRIBED BY THE STATUTE UNDER WHICH THE PROSECUTION WAS BROUGHT?

Noel Lee Lippman, an attorney, was accused of violating the provisions of Title 18 United States Code—§ 1510. In addition, the indictment charged Petitioner with conspiring with another person as well as aiding and abetting said person to commit the substantive violation. Section 1510, of Title 18, states:

> "(a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or (W)hoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> (b) As used in this section, the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States."

Subsequent to trial by jury on the foregoing charges, Petitioner was convicted on all counts. On direct appeal,

the Court of Appeals for the Sixth Circuit affirmed. Petition for Rehearing was denied following 185 days of deliberation.

To sustain a conviction on the substantive offense, the Government must prove the following elements:

> 1. That the defendant willfully endeavored, by means of certain actions to prevent the communication of information relating to a violation of a United States statute to a criminal investigator;
>
> 2. The actual existence of a criminal investigator;
>
> 3. That defendant possessed actual knowledge that the informant was attempting to pass on information to a Federal investigator.
>
> *United States* v *Williams,* 470 F.2d 1339 (8th Cir. 1973)

Petitioner herein, does not admit or deny the existences of element number two, above, that is to say that a criminal investigator was involved in the transactions relative to the prosecution. On the other hand, Petitioner respectfully suggests that elements one and three, above, were not substantiated by the evidence presented to the jury; notwithstanding the fact that subsequent to conviction the evidence must be reviewed in the light most favorable to the Government. *Glasser* v *United States,* 315 U.S. 60; 62 S. Ct. 547; 86 L. Ed. 680.

A review of the legislative history relating to 18 United States Code—1510 reveals that Congress enacted the statute for the purpose of extending protection to potential informants or witnesses and to those who communicate information to said investigators prior to a case reaching the court. (See: H. R. Rep. No. 685, U.S. Code, Congress &

Administrative News, 90th Congress, 1st Session, p. 1760) See also: *United States* v *Kozak,* 438 F.2d 1062 (3rd Cir. 1971).

Thus, the statute requires at least three actors, playing specific roles to support a prosecution. (1) the criminal investigator; (2) the informant, one who possesses information as to an offense against the United States, the object of a third party's endeavor to prevent relay of information to the investigator; and (3) the person, denounced by the statute, who endeavors by means of bribery, misrepresentation, intimidation, or force or threat thereof to obstruct, delay or prevent communication of the information by (2) to (1).

In the matter at bar, we have four characters operating in the scenario: (1) Special Agent Ronald S. Garibotto, Bureau of Narcotics and Dangerous Drugs; (2) Edward Zuber, the informant; (3) Noel L. Lippman, an attorney and Petitioner herein; and Leonard A. Staffel, a dentist. The record reflects the following facts:

(a) Zuber and Staffel were engaged in a joint venture to smuggle large quantities of marijuana—Staffel functioned as importer and Zuber the distributor.

(b) Subsequently Zuber was arrested at a farm near Monroe, Michigan for possession of 1,450 pounds of marijuana.

(c) Concomitant with Zuber's arrest, police confiscated a custom built camper belonging to Staffel.

(d) Following Zuber's release from jail on bond. Zuber attempted to extort $25,000.00 from Staffel; he was successful in obtaining $15,000.00 in cash from Staffel in return for his promised silence relative to Staffel's participation in the smuggling operation.

(e) On June 27, 1970, Staffel retained Lippman to represent him relative to a possible Federal investigation involving the marijuana enterprise.

(f) Between July, 1970, and March, 1971, Zuber successfully extorted money, attorneys fees, dental care for his wife and expenses from Dr. Staffel, under the threat of informing on him.

(g) Lippman agreed to represent Zuber on the state charges pending against him.

(h) On March 30, 1971, Lippman, Zuber, Michigan authorities, and Federal agents met to discuss the possibility of Zuber's cooperation relative to organized crime activities.

(i) On March 30, 1971, inquiries were made by Federal agents regarding Staffel at which time Lippman excused himself from the room so as to avoid a possible conflict of interest.

(j) On March 30, 1971, Zuber gave information, in the form of a written statement, to the Federal agents which implicated Staffel in the smuggling operation. This information was given outside the presence of Lippman and without Lippman's knowledge.

(k) On March 30, 1971, Zuber asked Lippman to arrange a meeting with Staffel later that night for the purpose of confirming the Zuber/Staffel arrangement for financial and other assistance.

(l) On March 30, 1971, Zuber, Staffel and Lippman met at Zuber's motel.

(m) On March 30, 1971, Zuber was carrying a concealed recording device.

(n) On March 30, 1971, Federal and State agents were monitoring the conversations of Zuber, Staffel and Lippman from the room next door to Zuber's.

(o) On March 30, 1971, Zuber demanded financial aid for himself and his wife from Staffel in return for his continued silence.

(p) On March 30, 1971, Staffel agreed to meet Zuber's demands.

The transactions that occurred at Zuber's motel were the basis of the substantive charge against Petitioner and under the facts presented in this record, Petitioner respectfully suggests that the instant prosecution represents an inverted application of the statutory proscriptions of 18 United States Code—1510, and as such, Petitioner's conviction should fall.

As demonstrated above, the Congressional intent of § 1510 is to afford protection to informants or witnesses from certain actions which might prevent the communication of information from the informant to a criminal investigator. Here, we have an unusual factual setting. We are confronted with the extortionate activity of Zuber towards his accomplice Staffel. We also have the extortion beginning before Lippman comes on stage. Under the Congressional purview of § 1510, we could logically expect Staffel to be cast as the aggressor. The facts herein, however, contradict that proposition. The record candidly portrays Zuber in the aggressive role—the antagonist and always the extortionist.

The events of March 30, 1971, are instructive when analyzed in the light of Congressional intent; for these are the events which encompass the substantive charge. It is essential to remember that the statute was *intended* to

protect an informer from some form of intimidation which would prevent communication of information to a criminal investigator. Logic would seem to dictate that a potential informer possess information which would help an investigator break a particular case. That a third party endeavors to prevent or delay the communication by utilizing some means of intimidation—thus, the statute is violated. The statute sets out the classic antagonist/protagonist situation. The informant/protagonist, and the intimidator/antagonist.

In this case, however, the roles are reversed—here we have Zuber, the informer/antagonist; and Staffel, the alleged intimidator/protagonist with the added character in the form of Lippman, the conciliator; Lippman, the attorney who represents both the antagonist and protagonist —the man in the middle.

Not only does this case represent reversed role playing by Zuber and Staffel; it contains an element which takes the matter completely outside the purview of the statute: That is, the fact that Zuber had already communicated every shred of information relating to Staffel's culpability in the marijuana smuggling before the ill-fated conference of March 30, 1971, at his motel room. The record is complete on this point. Zuber admitted that he had turned Staffel in to the Federal agents; given them the information they wanted and signed a statement completely inculpating Staffel. At that point, the agents' investigation was complete. There was nothing left for the agents to do but prepare the case report, present it to the U.S. Attorney and wait for the rendering of an indictment against Staffel.

The meeting held on the night of March 30, 1971, represents no more than an addendum to the already com-

pleted investigation; an addendum which produced not one scintilla of evidence which added to the strength of the agents' already substantial case. On these facts Petitioner's prosecution for obstructing justice is incredible.

An analysis of appropriate case law brings home the point. The first case under § 1510 to be brought before an Appellate Tribunal is *United States* v *Kozak,* 438 F.2d 1062 (3rd Cir. 1971); a matter which involved actual force and an assault upon an informant. The Third Circuit held that on the fact circumstances presented at trial, the requisite knowledge that the informant intended to give information to a criminal investigator was established; thereby sustaining the conviction. A second case involving appellate review of a conviction under § 1510, is *United States* v *Carzoli,* 447 F.2d 774 (7th Cir. 1971). In *Carzoli,* an open threat was made to one Smith in the presence of two Government agents. While defendant took the position that the "threat" was made in jest, the court sustained the conviction on the basis that it was immaterial whether or not a victim feels threatened. In this case, the witness testified that she considered defendant's "threat" as a joke —testimony which was contradicted by an earlier signed affidavit and by the testimony of the agents present at the time of the threat. The *Carzoli* court did point out, however, that "an element of the offense charged is an actual, existing investigation of possible violation of a criminal statute. It was necessary for the Government to show the circumstances under which communication of information was sought to be obstructed." 447 F2d at 779.

In *United States* v *Cameron,* 460 F.2d 1394 (5th Cir. 1972) the court reversed the conviction of an attorney accused of violating § 1510, on the grounds that (1) the statute was not intended to deal with communications between alleged accomplices; and (2) there was no evidence of force; threats, intimidation or misrepresentation.

In *United States* v *Williams,* 470 F.2d 1339 (8th Cir. 1973) The Court of Appeals reversed as to co-defendant Walker on the grounds that there was insufficient evidence to support the necessary element of scienter to sustain conviction.

Collterally, in a prosecution under 18 United States Code —1503,[4] the Court of Appeals for the Sixth Circuit ruled that "Particularly in view of the fact that 18 United States Code—1503 is a criminal statute which must be strictly construed; *United States* v *Essex,* 407 F.2d 214 (6th Cir. 1969), a threat in violation of the statute must relate to the possible testimony of the witness in a pending *Federal* proceeding (emphasis in the original) . . . the mere existence of that Federal proceeding is not sufficient to establish or support any inference that the Federal proceeding was the focus of the alleged threat." *United States* v *Baker,* 494 F.2d 1262 (6th Cir. 1974).

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[4] Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injuers any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The foregoing synopsis of relevant case law pursuant to § 1510, enables Petitioner to identify the following guidelines for argument:

Petitioner contends that the Government failed to prove the essential elements of the crime charged and that the prosecution itself fell outside the purview of the statute. The argument polarizes on three points of law:

> 1. That the statute was designed and intended to protect an informant or witness from coercion which would halt or impede the flow of information from said informant to a criminal investigation.

On this point the record is absolutely clear. Hundreds of pages of testimony were taken at trial relative to Zuber's extortionate pressure upon his accomplice Staffel. The record is equally clear that prior to the meeting at Zuber's motel on March 30, 1971, agents of both State and Federal Governments had successfully drained Zuber dry of incriminating evidence and information relative to Staffel; and secured his promise to testify against Staffel; and had sealed the bargain with the promise of help with regard to Zuber's other legal entanglements.

For all practical purposes, the investigation ended at the point Zuber signed his statement inculpating Staffel.

> 2. That Petitioner willfully endeavored to prevent communications between Zuber and Federal agents and that petitioner knew that Zuber intended to convey information to a criminal investigator.

Again, the record clearly speaks for itself. The uncontradicted testimony at trial was that Petitioner, with the consent of his client Zuber, arranged for Zuber to meet with State and Federal authorities to discuss the possibility

of Zuber's cooperation in relation to an investigation of organized crime activity.

Upon learning that the Federal agents wanted information regarding Petitioner's other client—Staffel, Petitioner withdrew from the meeting so as to avoid a possible conflict of interest. Shortly thereafter, Zuber spoke to Petitioner and stated that he had no intention of incriminating Staffel. The fact being, however, that Zuber did confess his, as well as Staffel's complicity in the smuggling operation . The meeting at the motel occurred a few hours later.

No evidence was presented to the jury to the effect that Lippman knew that Zuber was an informer on March 30, 1971, nor was evidence adduced that would support the inference that Zuber intended to convey information to Federal investigators. The point is driven home by the rationale of the Eighth Circuit in *United States* v *Williams*, 470 F.2d 1339 at 1342:

> "There was no evidence to show or to justify an inference that Walker had ever seen Arbelo prior to the incident under consideration; there was no showing that Walker had any knowledge that Williams or Brown had engaged in the trafficking of narcotics; and there was no evidence that Walker knew that the purpose of Arbelo's presence at the club was to gather information for a Federal investigator . . . We conclude that the evidence focused upon Walker is wholly inadequate to fasten him with criminal liability."[5]

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[5] *NOTE*: It must be remembered that Lippman had been retained to represent both Zuber and Staffel in his capacity as a criminal attorney the issue of identity and possible knowledge as to his clients' involvement in the marijuana would necessarily distinguish this case from that of *Williams* on those particular points.

"The House Committee on the Judiciary specifically stated in discussing scienter that there must be actual knowledge that the recipient or intended recipient of information be a criminal investigator as defined in § 1510(b). H.R. Rep. No. 658 U.S. Code, Cong. & Adm. New 90th Cong. 1st Sess. p. 1760 (1967). Thus the report states,

> 'For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of scienter as to the identity of the investigator.' *Id.* at p. 1762.

See and compare *United States* v *Kozak,* 438 F.2d 1062 (3rd Cir. 1971), which also involved a prosecution under 18 U.S.C. § 1510.

The evidence as to Walker leaves entirely too much to speculation. As we have seen his presence at the scene of the assault, his participation therein, and his acquaintanceship with appellant Williams are the only links in the chain of events which in any way involve him in the offense. In the absence of any evidence from which a jury with justification could find that Walker knew of Arbelo's status as a person who intended to convey information to a federal investigator and that at the time of the assault Arbelo possessed information relating to a criminal violation of the laws of the United States, we have no choice but to reverse the judgment against Walker."

It is highly unlikely that an experienced criminal attorney would knowingly and intentionally place himself in the position of offering his client's cooperation to law

enforcement officers and in the space of a few hours seek to impede the flow of communications between the same people he had sought and successfully brought together. Just as unlikely, is the inference that Zuber actually intended to turn informer for it was Zuber who was the aggressor in the entire scenario.

As the Eighth Circuit held:

> "Proof of an assault, without showing the additional requirement of scienter, is insufficient to establish a viable nexus upon which a conviction under § 1510 can be sustained. *Cf. United States* v *Mahanna,* 461 F2d 1110 (8th Cir. 1972). To hold otherwise would allow inferences to be drawn by the process of conjecture or speculation or on mere possibilities. Here the evidence, taken in the light most favorable to the government, is clearly as consistent with innocence as with guilt. *See generally United States* v *Kelton,* 446 F.2d 669 (8th Cir. 1971); *United States* v *Kozak,* 438 F.2d 1062 (3rd Cir. 1971); *McNeely* v *United States,* 353 F.2d 913 (8th Cir. 1965)
>
> 3. That notwithstanding the possible existence of a Federal investigation, the mere existence of that proceeding is insufficient to support any inference that the alleged criminal activity was related to said investigation.

The record reflects that Zuber was arrested by State authorities and charged with a State offense. The record also reflects that Staffel was asked by Federal Agents in June, 1970, to allow a complete inspection of his automobile and at that point he was suspected of having transported marijuana in his automobile. Apparently satisfied with

their inspection of the car, the Federal Agents returned it to Staffel—no charges were filed and no further contact with Federal agents occurred until March 30, 1971, when Lippman took Zuber to the meeting described above.

Yet, Petitioner was indicted under Section 1510, which states: ". . . Relating to a violation of any criminal statute of the United States . . ." Apparently, § 1510 was meant to encompass communications relating only to Federal crimes, and under the doctrine set out in *United States* v *Essex,* 407 F.2d 214 (66th Cir. 1969), the statute must be strictly construed. Supporting, is the court's comment in *United States* v *Cameron,* 460 F.2d 1394 at 1401:

> "The real need for this legislation is the difficulty encountered in the presentation of a case for trial in the field of organized crime and racketeering. It is in these fields that witnesses consistently refuse to cooperate with the prosecution because of threats or other kinds of intimidations directed at them or their families. The ability of organized crime to impose silence on its members and thereby protect both the leaders and the membership of this criminal organization is the primary source of its power and affluence. This strangulation by silence of evidence against the organization has been demonstrated in many cases where potential informants or witnesses have been beaten or tortured or otherwise silenced. There have been instances, according to the Attorney General, where this fear has actually prevented the initiation of proceedings of the matters under investigation. This frustration of criminal investigations and prosecutions should no longer be tolerated, but since there is no statute which presently protects witnesses during the investigative stage, there is need for the enactment

of this legislation." 1967 U.S. Code Congressional and Administrative News, p. 1760, at pages 1761-1762.

"This Report makes clear that Section 1510 was designed to deter the coercion of potential witnesses by the subjects of federal criminal investigations prior to the initiation of judicial proceedings. The statute was just as clearly not intended to deal with communications between alleged accomplices to the commission of federal offenses."

Under the statutory construction required by *Essex,* Petitioner contends that there was insufficient evidence to support the proposition that the investigation supporting the prosecution in the court below was, in fact, a Federal inquiry into a violation of a statute of the United States. *United States* v *Baker,* 494 F.2d 1262 (6th Cir. 1974)

To recapitulate then, Petitioner presents the argument that the prosecution brought in the court below represents an inverted application of 18 United States Code—1510; that the elements of the offense demand proof that Petitioner willfully endeavored to obstruct the flow of information between an informer and a Federal agent; that a federal criminal investigator involved in an inquiry into violations of United States Statutes, did in fact, exist; and that Petitioner possessed the requisite knowledge that the informant was attempting to pass on information to a Federal investigator. Petitioner respectfully suggests to this Honorable Court that no evidence was presented by the Government to support the conclusion that Petitioner willfully obstructed justice; that there was in fact a Federal investigation in progress; or that he had any knowledge whatsoever that Zuber was a Federal informant or that Zuber even contemplated supplying information to Government agents.

Petitioner further suggests that the matter at bar is one of first impression in this Court; that the prosecution in the court below reflects an expansion of the statutory proscriptions described 18 United States Code—1510, which has the chilling effect of curtailing the responsibilities mandated by the American Bar Association's Canon of Ethics particularly in the area of the criminal law. Moreover, this case is of particular significance when viewed, as it must be, in the light and wake of the Watergate scandals. To permit the unrestrained, expansive interpretation of statutory prosecutions within the purview of Federal criminal law, sets in motion forces which will eventually erode the concept of fundamental fairness and due process of law.

II.

UNDER THE CURRENT POSTURE OF THE FOURTH AMENDMENT MAY A CONVICTION BE PERMITTED TO STAND WHERE EVIDENCE INTRODUCED AT TRIAL WAS OBTAINED PURSUANT TO A WARRANTLESS SEARCH, NOTWITHSTANDING CONSENT, WHERE THERE IS EVIDENCE WHICH SUGGESTS THAT SAID CONSENT WAS THE PRODUCT OF COERCION?

At trial, pursuant to a Motion to Suppress, and on direct appeal to the Sixth Circuit, Petitioner challenged the validity of the use of electronic eavesdropping as an aid in gathering evidence of criminal activity. The trial court denied relief and the Court of Appeals sustained on the rationale found in *United States* v *White,* 401 U.S. 745 (1971) *rehearing denied* 402 U.S. 990. The *White* case held that the electronic recording of a conversation without a warrant but with the consent of a party to the conversation did not violate the Fourth Amendment. The courts below rejected the argument that Zuber's consent was coerced on the ground that said consent was given

pursuant to promises of lenient treatment with respect to other criminal activity.

The Fourth Amendment postulates an absolute principle: that a warrantless search is per se unreasonable unless the search comes within one of the few exceptions recognized by the Supreme Court. *Almeida-Sanchez* v *United States,* 413 U.S. 266 (1973); *Cady* v *Dombrowski,* 413 U.S. 433 (1973); *Katz* v *United States,* 389 U.S. 347 (1967); *Camara* v *Municipal Court,* 387 U.S. 523 (1967). Here, we are faced with the Government's proposition that the "search" *i.e.,* the electronic eavesdropping, was valid because Zuber, a party to the conversations, gave his consent to the eavesdropping. The Court ruled that the consent was not coerced on the basis of the Government's promises of leniency to Zuber. This ruling completely obviated the underlying rationale of "consent."

We agree that a warrantless search may be conducted pursuant to a valid consent. *Davis* v *United States,* 328 U.S. 582 (1945); *Zap* v *United States,* 328 U.S. 624 (1945), but that is not the fact situation herein.

Zuber, the pivotal figure in the prosecution at bar, was himself, the prime object of a State prosecution for possession of marijuana with intent to distribute, and a Federal investigation into the wholesale smuggling of marijuana. His cooperation with the Federal authorities was induced by the promise of leniency by both the State and the Federal agencies. The consent to obtain incriminating information through the use of electronic eavesdropping device was "voluntary" but premised upon the belief that through his cooperation he would extricate himself from his own legal troubles.

It is well settled throughout the Federal circuits that a consent search is unreasonable under the Fourth Amend-

ment if the consent was induced by the deceit, trickery, or misrepresentation of the officer conducting the investigation. *Gouled* v *United States,* 255 U.S. 298 (1921); *United States* v *Bland,* 458 F.2d 1, (5th Cir. 1972); *United States* v *Jaskiewicz,* 433 F.2d 415 (3rd Cir. 1970); *United States* v *Prudden,* 424 F.2d 1303 (9th Cir. 1969); *Cohen* v *United States,* 405 F.2d 34 (8th Cir. 1968); and *United States* v *Scalfani,* 265 2d 408 (2nd Cir. 1959).

The Fourth Amendment proposition, of course, is that a search may be made without a warrant if the individual freely and intelligently gives his unequivocal and specific consent. This general rule is modified, however, by the axiom that in cases of disputed consent, the Government must bear the burden of proving with clear and positive evidence, that a valid consent was given *Judd* v *United States,* 190 F.2d 649 (D.C. Cir. 1951); *Channel* v *United States,* 285 F.2d 217 (9th Cir. 1960). In the matter at bar, not only did the Government fail to sustain its requisite burden relative to Zuber's "consent", the evidence indicated that when the State failed to live up to its promises. Zuber attempted to withdraw his plea to the marijuana charges. On the record, he admitted that following his sentencing in State court, he realized that he had been duped into cooperating with the authorities. That the Government failed to carry the burden of proving that Zuber's consent to permit agents to monitor Appellant's conversations is reversible error. *Bumper* v *North Carolina,* 391 U.S. 543; *Johnson* v *United States,* 333 U.S. 10; *Amos* v *United States,* 255 U.S. 313.

The Fourth Amendment requires that consent not be coerced by explicit or implicit means, by implied threat or covert force. For no matter how subtle the coercion is applied, the resulting consent would be no more than a pretext for an unjustified police intrusion against which the

Fourth Amendment is directed. The following admonition is instructive:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."
>
> *Boyd* v *United States,* 116 U.S. 616 at 635

Petitioner maintains that the decisions in the courts below misconstrued the element of "consent", and by so doing failed to reach the compelling issue of a Fourth Amendment violation.

III.

UNDER THE CURRENT POSTURE OF THE FIFTH AMENDMENT MAY A CRIMINAL CONVICTION BE PERMITTED TO STAND WHERE THE RECORD REFLECTS THAT THE TRIAL COURT'S CHARGE TO THE JURY VIOLATED DUE PROCESS OF LAW?

At trial, the Government proceeded upon the theory that Petitioner endeavored to interrupt the flow of information from Zuber to the BNDD agents by bribery and intimidation. The evidence, however, controverted this theory. It was established beyond a doubt that Zuber's conduct prior

to the indictment of Petitioner was no less than extortionate; that Zuber had prior convictions for extortion; and that Staffel was generally intimidated by Zuber's demands. The Government, however, equated Zuber's conduct with bribery in that Staffel and Petitioner, acting as Staffel's agent, acquiesced to Zuber's blackmail.

By definition, bribery is "the offering, giving, receiving, or soliciting of anything of value to influence action . . ." and extortion is "the unlawful taking of money from another. To gain by wrongful means, to obtain in an unlawful manner, to compel payments by means of threats of injury to person, property or reputation." (Blacks Law Dictionary, Revised 4th Ed., 1968).

In response to the Government's theory that Petitioner engaged in bribery, Lippman was placed in the position of defending against the charge, and in so doing, the issue of extortion was placed before the jury. The plain fact that Lippman was manuevered into the position of having to defend himself against the accusations of the Government flies in the face of the defendant's right to the presumption of innocence.

The record indicates, that once Lippman was placed in the position of having to offer a defense to the Government's charges, he chose to proceed upon the theory of entrapment. A cognizable defense in a § 1510 prosecution. At this point, it is necessary to refer to the argument presented under issue I, above. Taking the fact circumstances from the record, we may draw the conclusion that the Government had obtained all the necessary elements for a prosecution against Staffel prior to the meeting held on March 30, 1971, and that there was no necessity from an evidentiary standpoint for the Government to involve itself in the recording of the conversations of said date.

Given the factual background of the case; the necessity of presenting a defense to the Government's accusations; Lippman proceeded upon the only logical course available: a bifurcated defense claiming extortion on the part of the informer Zuber and entrapment on the part of the Government.

At trial, the court instructed the jury: "This evidence of blackmail was offered to raise in the minds of the jury a reasonable doubt on the issue of the intent with which the defendant acted." In addition, the trial court refused to give the defenses' proffered instruction on the theory of entrapment. Taken as a whole, the court's charge effectively shifted the burden of proof from the Government to the defendant, a shift which is obnoxious to due process of law.

The extortion entertained by Zuber is rampant throughout the record in this matter, and it is well settled that "extortion" requires an intent to obtain that which in equity the party is not entitled to receive and does not extend to the use of force. *United States* v *Enmons,* —— U.S. ——, 93 S. Ct. 1007 (1973). In addition, the fact that at times the victim and the extorter were on cordial terms does not vitiate the extortion. *United States* v *Hyde,* 448 F.2d 815 (5th Cir. 1971). Here, the actual victim of the extortion, Staffel, was subjected to demands for money and other services (legal services and dental care) in return for his purported silence. The victim's acquiescence, in part carried out by Petitioner, were in response to said demands. At no time did Petitioner *demand* silence on the part of Zuber. To the contrary, the record reflects that Petitioner was instrumental in bringing Zuber to the meeting wherein Zuber decided (without Petitioner's knowledge) to turn informer against Staffel. On this point, the trial court seriously misapprehended the theory of the defense, thus prejudicing him in the eyes of the jury.

The failure of the trial court to properly instruct the jury on the theory of entrapment too, created prejudice. It is well settled that instructions on entrapment will be held to be defective if they are so vague and ambiguous so as to permit the jury to misinterpret the allocation of the burden of proof as well as the quantum of proof. *Pulido* v *United States,* 425 F.2d 1391 (9th Cir. 1970); *Pratti* v *United States,* 389 F.2d 660 (9th Cir. 1968); *Stauss* v *United States,* 376 F.2d 416 (5th Cir. 1967); *United States* v *Vole,* 435 F.2d 774 (7th Cir. 1970); *Gay* v *United States,* 480 F.2d 923 (8th Cir. 1969). It is equally well settled that a defendant in a criminal case is entitled to have the trial court present instructions to the jury which relate a theory of defense. *United States* v *McCann,* 465 F.2d 147 (5th Cir. 1972); *United States* v *Howard,* 433 F.2d 505 (D.C. Cir. 1970); *United States* v *Rodriquez,* 446 F.2d 859 (9th Cir. 1971). See also, *Ayala* v *United States,* 371 F.2d 515 (9th Cir. 1967).

On the record in the matter at bar, there is ample evidence to support the defense contention that Zuber was effectively operating an extortion upon Staffel, and that Lippman, acting as Staffel's agent attempted to appease Zuber. There too, is ample evidence of entrapment on the part of Government whereby the agents enlisted Zuber to gather evidence of narcotics violations after the agents had been successful in constructing a *prima facie* case against Staffel.

The trial court's failure to present the defense theory to the jury created an untenable shift in the burden of proof from the Government to the defendant in violation of the Fifth Amendment. On direct appeal, the appellate panel, misapprehended the thrust of the argument relative to this issue.

CONCLUSION

Petitioner herein submits three issues for this Court's consideration: (1) That the conviction obtained in the court below represents an inverted application of Title 18 United States Code—§ 1510; and as such, conviction should be reversed; (2) That an invalid search was utilized to gather highly prejudicial evidence, said evidence having been the cornerstone of the Government's case; and (3) That the trial court's instructions to the jury effectively shifted the burden of proof to the defense.

Wherefore, pursuant to the foregoing, Petitioner prays that this Honorable Court issue a Writ of Certoriari to the United States Court of Appeals for the Sixth Circuit and pursuant thereto direct that said conviction be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America, Plaintiff, v Noel Lee Lippman, Defendant.	Criminal No. 47647

NOTICE OF APPEAL

Notice is hereby given that Noel Lee Lippman, defendant above-named, appeals to the United States Court of Appeals for the Sixth Circuit, from the Judgment of Conviction entered in this cause on May 11, 1973, by the Honorable Robert E. DeMascio, United States District Judge.

/s/ Joseph P. Zanglin
Attorney for Defendant
956 City National Bank Building
Detroit, Michigan 48226
961-4243

Dated: May 11, 1973

APPENDIX B

No. 73-1689

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, v Noel Lee Lippman, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Michigan.

OPINION

Decided and Filed 27, 1974.

Before: Celebrezze and Lively, Circuit Judges and Wilson.* District Judge.

Celebrezze, Circuit Judge. Appellant appeals his jury conviction of conspiracy and obstruction of communication to a criminal investigator of information relating to a violation of a federal statute, actions proscribed by 18 U.S.C. §§ 371 and 1510. Appellant, an attorney, and a co-defendant Staffel, a dentist, were charged with endeavoring by bribery and intimidation to prevent one Zuber from communicating information about violations of federal narcotics statutes. Before the trial, Staffel pleaded guilty to both counts of the indictment.

Staffel and Zuber had been involved in smuggling marijuana. Zuber was apprehended and threatened to impli-

* The Honorable Frank W. Wilson, Chief Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

cate Staffel unless Staffel paid Zuber's expenses, legal fees and did some dental work for Zuber's wife under an agreement to support one another in event of trouble. Staffel retained Appellant as his attorney and Appellant later agreed also to represent Zuber. Zuber was continually asking Staffel for money to keep him from talking and Appellant was continually attempting to get Staffel to live up to his agreement to pay Zuber. At one point, Appellant gave Zuber $100 when Staffel had no money with him. Zuber eventually began cooperating with the authorities in obtaining evidence against Staffel and on several occasions carried a recording device into meetings with Staffel and Appellant.

Appellant raises several issues. First, he contends that the statute under which he was charged is unconstitutionally vague. 18 U.S.C. § 1510 (1967) provides:

> (a) Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force or threats thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator; or
>
> Whoever injures any person in his person or property on account of the giving by such person or by any other person of any such information to any criminal investigator—
>
> Shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> (b) As used in this section, the term "criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or

> prosecutions for violations of the criminal laws of the United States.

It is asserted that the statute does not define an objective standard from which the trier of fact can determine whether the defendant's conduct obstructed the communication of information relating to a federal crime. In determining whether a statute violates the due process concept of vagueness, the Supreme Court has stated the standard to be applied:

> We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States* v *Wurzbach,* 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. *United States* v *Petrillo,* 332 U.S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Connally* v *General Construction Co,* 269 U.S. 385 (1926). *Jordan* v *DeGeorge,* 341 U.S. 223, 231-32 (1951). (Footnote omitted).

We find that this standard is met by the statute before us. The language of the statute proscribes, in sufficiently clear terms, the obstruction of an investigation into a criminal matter by certain designated unlawful means. Clearly, an investigation was being made into the possible criminal activity of Staffel regarding his involvement in marijuana trafficking.

Appellant also asserts that the statute is overly broad in that it does not require that an actual investigation already have been commenced and that it attempts to include any information regarding any criminal violation. However, whether or not there may be circumstances in

which this statute could be unconstitutionally applied the rule is that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v *Raines*, 362 U.S. 17, 21 (1960). Therefore, we hold that 18 U.S.C. § 1510 is not unconstitutional on its face. In so holding, we note that we have previously found a similar state to be valid. *Anderson* v *United States*, 215 F.2d 84 (6th Cir. 1954), *cert. denied sub nom., Lewis* v *United States*, 384 U.S. 888, *rehearing denied*, 384 U.S. 922.[1]

Appellant next contends that the indictment failed to set out in sufficient detail all the elements of the offense. It is asserted that neither of the two counts sufficiently identified the victim of the alleged endeavor to bribe, nor was it al-

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[1] In *Anderson*, the statute we upheld, 18 U.S.C. § 1503, (1948) read as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

leged that an actual investigation was taking place. We find no merit in either of these allegations. The statute does not require that an investigation be taking place, but prohibits the obstruction of any communication to an investigator. It is required that the defendant have actual knowledge that the intended recipient of the information be a federal criminal investigator. *United States* v *Williams,* 470 F.2d 1339 (8th Cir. 1973), *cert. denied,* 411 U.S. 936. We find that the indictment sufficiently alleged Appellant's knowledge and that Zuber was the intended victim of the bribe. The indictments alleged that as part of a conspiracy the defendants

> "Leonard A. Staffel, D.D.S., and Noel Lee Lippman, Esq., would willfully and knowingly endeavor by means of bribery and intimidation to obstruct, delay and prevent the communication of information by one Edward Alfred Zuber relating to violations of Sections 176(a) and 174 of Title 21 of the United States Code to Special Agents of the Federal Bureau of Narcotics and Dangerous Drugs;"

and that the defendants

> "did willfully and knowingly endeavor and cause and endeavor by means of bribery and intimidation to obstruct, delay and prevent the communication of information by Edward Alfred Zuber relating to violations of Section 176(a) and 174 of Title 21, United States Code of Special Agents of the Federal Bureau of Narcotics and Dangerous Drugs, United States Department of Justice."

It is asserted that the electronic eavesdropping conducted by Zuber on conversations between Zuber, Staffel, and Appellant was conducted in violation of the Fourth Amendment. This contention is governed by the holding of *United*

States v *White*, 401 U.S. 745 (1971), *rehearing denied*, 402 U.S. 990, which held that electronic recording of conversations without a warrant but with the consent of a party to the conversation, does not violate the Fourth amendment. Nor do we agree that Zuber cannot be said to have given consent because his cooperation was based on a promised recommendation for a lesser sentence. *See United States* v *Walker*, 320 F.2d 472 (6th Cir. 1963), *cert. denied*, 375 U.S. 934.

Appellant also contends that the District Court improperly denied his motion for acquittal on the basis that the evidence showed a scheme of blackmail by Zuber rather than a bribery by Appellant. The court properly instructed the jury that they could find Appellant guilty if they found that he had provided funds to Zuber with specific intent to buy his silence, but that if Appellant's actions were because of threats by Zuber, then they should acquit Appellant. This is a correct statement of the law in a prosecution for bribery. *United States* v *Barash*, 365 F.2d 395, 401-2 (2nd Cir. 1966). The evidence presented a jury issue in this regard.

Neither can we accept Appellant's argument that the District Court improperly instructed the jury on the question of entrapment. While we find the Court's instructions proper, we also find them unnecessary. The alleged offense was not instigated by law enforcement officials. *United States* v *Russell*, 411 U.S. 423 (1973). The evidence was to the effect that prior to the involvement of law enforcement officials, Staffel had agreed with Zuber that if either were arrested, the other would render support as a condition of the apprehended party's silence. After Zuber's arrest, Staffel had given Zuber $15,000. From the begining of his involvement in the case, Appellant encouraged Staffel to provide Zuber with support in order to silence him. Appellant provided $3,500 of Staffel's money, over which

he had power of attorney, to another lawyer who represented Zuber at his preliminary hearing. He later aided Staffel in securing a bank loan of $5,000 and took $4,000 of this sum for himself as a fee, having decided that he would provide the legal services Zuber required as a condition of his silence. At one meeting between Appellant, Staffel and Zuber, Appellant himself gave Zuber $100. We find that this evidence did not warrant an instruction on entrapment.

We have likewise considered the Appellant's other contentions in regard to the trial court's charge and find them to be without merit.

The Appellant likewise contends that the trial court erred in its instructions to the jury regarding reasonable doubt. In connection with certain elements of the offenses charged and in certain instructions upon reasonable doubt, the Court used the phrase "you would be justified in returning a verdict of not guilty". Upon numerous other occasions, however, the Court clearly instructed the jury that it must acquit the accused if the jury had a reasonable doubt about any element of the offense charged. When the charge is read as a whole, it is clear that no error was made in this regard. *Ashe* v *United States,* 288 F.2d 725 (6th Cir. 961).

Finally, we find that the verdict of guilty is supported by the evidence. As we have noted, the evidence is clear that Appellant played an active role in the attempts to keep Zuber from talking to government investigators. Appellant was never himself the object of any threats or attempted blackmail on the part of Zuber. On several occasions he urged Staffel to live up to his agreement with Zuber and he later negotiated an agreement between Zuber and Staffel that Staffel would pay Zuber $200 per month. We hold that these actions are within the purview of 18 U.S.C. § 1510. The judgment of the District Court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, v Noel Lee Lippman, Defendant-Appellant.	No. 73-1689

ORDER

Before: Celebrezze, and Lively, Circuit Judges, and Wilson, Chief District Judge.*

Appellant having filed a petition for rehearing en banc and no judge of the Court having requested a rehearing en banc, the motion has been referred to the panel which heard the original appeal. The Court has considered the petition for rehearing and concludes that no issues are raised therein which were not considered upon the original submission.

The Court being advised, it is Ordered that petition be, and it thereby is, denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

* The Honorable Frank W. Wilson, Chief Judge, U. S. District Court for the Eastern District of Tennessee, sitting by designation.